FILE COPY.

No. 49

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1905.

In the matter of COSMOPOLITAN POWER COMPANY, *Bankrupt.*

STATE OF NEW JERSEY, *Appellant,*

vs.

WILLIAM F. ANDERSON, trustee of COSMOPOLITAN POWER COMPANY, Bankrupt, *Appellee.*

Office Supreme Court U.S.
FILED
JAN 27 1906
JAMES H. McKENNEY,
Clerk

MOTION, NOTICE, PETITION AND BRIEF ON BEHALF OF APPELLEE IN SUPPORT OF HIS MOTION FOR LEAVE TO ASSIGN CROSS-ERROR, OR FOR THE ALLOWANCE OF A WRIT OF CERTIORARI, TO PERMIT HIM TO ASSIGN ERROR UPON THE DECREE OF THE CIRCUIT COURT OF APPEALS.

HORACE KENT TENNEY AND
FREDERICK D. SILBER,
Counsel for Appellee.

CHAMPLIN LAW PRINTING CO.

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MOTION.

Comes now William F. Anderson, Trustee, appellee and petitioner herein, by Horace Kent Tenney and Frederick D. Silber, his counsel, and moves this Honorable court alternatively for leave to assign cross-error upon the record on behalf of appellee, or for a writ of *certiorari* or other proper process directed to the Honorable Judges of the United States Circuit Court of Appeals, for the Seventh Circuit, requiring said court to certify to this court for its review and determination, a certain cause in the said Court of Appeals, lately pending, wherein the State of New Jersey was appellant, and this petitioner, William F. Anderson, trustee, appellee; and to that end he now tenders herewith his petition and brief, a certified copy of the entire record in such

cause in said Circuit Court of Appeals, now being on file in the office of the clerk of this court, in case No. 302, entitled the *State of New Jersey, appellant* vs. *William F. Anderson, trustee, appellee,* and in case such *certiorari* is granted, that said transcript now on file be ordered to stand as a return to the writ.

Horace Stern

Frederick W. Seltzer.

Counsel for Appellee.

NOTICE.

To Messrs. Levy Mayer and Robert H. McCarter, counsel for appellant, State of New Jersey:

You and each of you are hereby notified that on Monday, the 12th day of February, A. D. 1906, upon the convening of the Supreme Court of the United States, or as soon thereafter as counsel can be heard, we shall move on behalf of William F. Anderson, trustee in bankruptcy of Cosmopolitan Power Company, appellee and petitioner in the above entitled cause, for the entry of an order authorizing said appellee to assign cross-error or for an order directing that a writ of *certiorari* issue to the Circuit Court of Appeals, for the Seventh Circuit, directing said court to certify to the Supreme Court of the United States, the record in the above entitled cause, for review and determination, and that if such *certiorari* be ordered, the transcript now on file be or-

dered to stand as a return thereto; upon which motions we shall submit the brief which is hereto attached.

Horace Kent Tenney

Frederick M. Sibley

Counsel for Appellee.

The foregoing notice is hereby accepted and delivery of a copy thereof and of the petition and brief in support of said motion are hereby acknowledged this 22 day of January, A. D. 1906.

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Counsel for Appellant.

Petition for leave to Assign Cross-error, or for an Order for a Writ of Certiorari to the Circuit Court of Appeals for the Seventh Circuit.

To the Honorable, the Chief Justice and associate justices of the Supreme Court of the United States:

Your petitioner, William F. Anderson, respectfully represents, that on April 23, 1903, a petition in bankruptcy was filed in the District Court of the United States for the Northern District of Illinois, against the Cosmopolitan Power Company, a New Jersey corporation, and that thereafter an adjudication was had in course; that on December 21, 1903, the said State of New Jersey, respondent, filed its proof of claim against said bankrupt in the sum of $9254.90, in and by which proof of claim the said respondent showed that the indebtedness claimed against said bankrupt arose upon license fees or franchise taxes levied by said respondent for the years 1902 and 1903, under the provisions of an act of the legislature of said State of New Jersey, together with interest and costs accruing upon said claims; that annexed to said proof of claim was a statement as follows:

Tax for 1902	$5,750.00
Interest to October 15, 1903	891.25
Costs on injunction proceedings because of non-payment of taxes	26.15
Tax for 1903	2,500.00
Interest to October 15, 1903	87.50
	$9,254.09

That thereafter, on February 12 1904, said respondent filed its motion for an order upon this petitioner as trustee to pay said claim of respondent in full as taxes in advance of the payment of dividends to the creditors of said estate.

That thereafter this petitioner as trustee, on the 4th of January, 1904, filed objections to said claim of the State of New Jersey, objecting to the allowance of any amount whatever to said claimant and objecting to the granting of any priority or preference to said claim as taxes, and objecting to the allowance of said claim upon other grounds; that said matter coming on to be heard upon said claim and the objections filed thereto, before the referee, an order was entered by said referee, reducing the taxes for 1902 from $5750 to $4250; reducing the interest upon the taxes for 1902 from $891.25 to $669.93, denying all taxes for 1903, and allowing to the State of New Jersey, respondent, a general claim in the sum of $4943.08.

That thereafter respondent filed a petition for review to the District Court, in which court, upon a hearing of said petition for review, an order was entered affirming the order of the referee.

That thereafter, said state of New Jersey, respondent, obtained an appeal to the United States Circuit Court of Appeals for the Seventh Circuit, in which court, on April 11, 1905, the decree of the District Court was affirmed as to the amount allowed for license fee for 1902, and as to the denial of any priority to said claim, but the decree of the District Court was reversed as to the disallowance of the license fee for 1903, and the District Court was ordered to add to its allowance of a general claim the sum of $2,500, less certain rebates of interest upon said amount.

That thereafter, on the 11th day of May, the said State of New Jersey, appellant, procured from Mr. Justice Day, a

certificate that in his opinion the determination of the questions arising upon the record of said cause, is essential to the uniform construcion of the Bankruptcy Act throughout the United States, and an order allowing an appeal to said appellant; that said appeal was docketed in the office of the clerk of this court as No. 302, and that the transcript of the record upon said appeal has been printed and is now on file, reference to which transcript is hereby particularly had, to the same effect as if it were attached to this petition.

Your petitioner further represents, that he contended before said Circuit Court of Appeals, that the alleged taxes for 1903 should not be allowed as a claim against said bankrupt estate, for the reason that under the statutes of New Jersey, under which said alleged taxes were levied, the said Board of Assessors were required to make their return on or before the first Tuesday of May, in each year, and to certify and report the basis of the license fee or franchise tax on or before the first Monday of June in each year and that the statutes of New Jersey provided that such license fee or franchise tax, when determined, should be a debt due from such corporation to the state, on which the state might maintain an action at law. It was contended by petitioner in the Circuit Court of Appeals, that on April 23, 1903, the day the bankruptcy petition was filed against the Cosmopolitan Power Company, there was no indebtedness in existence or due from the bankrupt to the State of New Jersey and that such indebtedness did not arise until June 1st, subsequent to the filing of the bankruptcy petition.

It was further contended that the sum demanded by respondent as a franchise tax for 1903, was a contract obligation and not a tax, and that it could not be allowed as a claim against the bankrupt, because under the Bankruptcy Act, Section 63 A, a debt to be proved must be a fixed liabil-

ity absolutely owing, at the time of the filing of the petition against the bankrupt.

Your petitioner further represents, that the decree of the Circuit Court of Appeals, was erronous in that it directed the District Court to make an allowance for the franchise tax or license fee of 1903; that the State of New Jersey, appellant, procured an order allowing it an appeal to this court, on the last day of the thirty days allowed for taking such appeal; that if this court should take the view that the claim made by the State of New Jersey is entitled to priority, and render judgment accordingly, such priority might also extend to the license fee for 1903, which petitioner contends, was improperly allowed in any amount; that the same questions are involved in the consideration of the allowance of the license fee or franchise tax for 1903, as are involved in the allowance of the license fee for 1902, and since the court has taken jurisdiction to consider the questions involved in the allowance of the license fee for 1902, petitioner should be permitted, for the protection of the rights of creditors of said bankrupt estate, to assign error upon the allowance of the license fee or franchise tax for 1903, so that the entire case may be determined.

Petitioner further alleges that he is advised by counsel, that unless he be permitted to assign cross-error upon said record or unless this court orders that a writ of *certiorari* issue to said Circuit Court of Appeals, so that petitioner can assign error, upon its said decree, he may be deprived of any right or opportunity to complain of the action of said Circuit Court of Appeals, in reversing the decree of the District Court, and in directing said District Court to add to its allowance the sum of $2500, representing the license fee or franchise tax for 1903.

Wherefore, your petitioner respectfully prays for an order permitting him to assign cross-error, upon the record

filed in this court, in No. 302, entitled *The State of New Jersey, Appellant,* vs. *William F. Anderson, Trustee of the estate of Cosmopolitan Power Company, bankrupt, appellee;* or if that be not allowed, that a writ of *certiorari* may be issued out of and under the seal of this court, directed to the United States Circuit Court of Appeals, for the Seventh Judicial Circuit, commanding the said court to certify and send to this court, on a day certain, to be therein designated, a full and complete transcript of the record of proceedings of the said Circuit Court of Appeals, in the said case entitled *The State of New Jersey, Appellant* vs. *William F. Anderson, trustee of the Cosmopolitan Power Company, bankrupt Appellee,* No. 1122, to the end that the said cause may be reviewed and determined by this court, as provided by law, and that your petitioner may have such other or further relief or remedy in the premises as to this court may seem appropriate, and that so much of the decree of said Circuit Court of Appeals in the said case as required the District Court of the United States for the Northern District Illinois, to allow to said State of New Jersey respondent, the sum of $2500, less a certain rebate of interest, for the franchise tax or license fee of 1903, levied against the Cosmopolitan Power Company, bankrupt, may be reversed by this court.

Petitioner further prays, that in case this court awards a writ of *certiorari,* it will also order that the transcript of the record now on file in this cause stand as a return to said writ and be treated as the record for the purpose of hearing and deciding the errors assigned by petitioner upon the decision of the Circuit Court of Appeals, as above stated.

And your petitioner will ever pray.

Horace Kent Tenney...

Frederick N. Sibley...

Counsel for Petitioner.

STATE OF ILLINOIS, } ss.
COUNTY OF COOK. }

Frederick D. Silber, being first duly sworn on oath deposes and says, that he is one of the counsel for Willliam F. Anderson, Trustee of Cosmopolitan Power Company, bankrupt, the petitioner; that he prepared the foregoing petition and that the allegations thereof are true as he verily believes.

Frederick D. Silber

Subscribed and sworn to before me a Notary Public in and for Cook county, Illinois, by said Frederick D. Silber, this 22 day of January, A. D. 1906.

Hettie Weisman.
Notary Public in and for Cook county, Illinois.

My commission expires. Nov. 3-1908.

Brief in Support of Said Motions on Behalf of Appellee, Petitioner.

This court has granted an appeal in this cause, not as a matter of right to the appellant, but for the purpose of settling questions of law, so that hereafter the decisions of lower courts may be uniform. It would therefore seem to be logically appropriate that the case be so presented to the court that it can decide *all the questions involved*. This, however, may not be accomplished unless an affirmative order is made in petitioner's favor, looking to that end.

For the purpose of the present application we may assume that no question arises as to the license fee for 1902 except that of priority of payment, and that is a debt absolutely payable at the date of bankruptcy and therefore a provable claim. As to the license fee for 1903, two questions arise; (1) whether it is a provable claim, and (2) if provable, whether it is entitled to priority.

The Court of Appeals has decided in favor of petitioner upon the question upon which the case was brought here by the State of New Jersey, and which applies to the claim for both years, *viz.*, that of priority; but has decided against petitioner upon the question whether the license fee for 1903 is a provable claim. If the latter is held not to be a provable claim, this of course, disposes of any question of priority. But if the decision of the Court of Appeals that it is a provable claim is sustained, then the question of priority arises as to that claim also.

As the question of the allowance of this license fee as a claim in bankruptcy is to be decided by the court, we submit that both phases of that question which the record presents should be passed upon.

To attain this end, and prevent what would be but a partial decision of the case, it seems necessary to allow the petitioner to assign cross-errors on the record filed on the appeal of the State of New Jersey, or to order a writ of *certiorari* in his favor.

The reasons for this, somewhat more fully stated, are as follows:

The District Court *disallowed* the claimed franchise tax or license fee for 1903, and denied all claim to priority to the reduced license fee for 1902.

Upon appeal by the State of New Jersey to the Circuit Court of Appeals, the judgment of the District Court was affirmed, in all respects excepting as to the allowance of any license fee for 1903, and as to that part of the order, the judgment of the District Court was reversed with direction to add to its allowance $2500, representing the license fee claimed for 1903, by the State of New Jersey.

Appellee could not appeal from the decree of the Circuit Court of Appeals, since the only question involved in such an appeal would be whether or not the Circuit Court of Appeals was right in allowing a general claim for the license fee of 1903. That did not involve a question which might have been taken on appeal or writ of error from the highest court of a state to this court; nor did it involve a question whose determination is essential to a uniform construction of the Bankruptcy Act throughout the United States. Under Sec. 25, of the Bankruptcy Act, these are the only cases in which an appeal may be had to this court. Appellee was therefore concluded by the decree of the Circuit Court of Appeals.

On the last day of the thirty days allowed by rule of this court for an appeal in bankruptcy matters appellant, the State of New Jersey, obtained a certificate from Mr. Justice

Day, as required by section 25, Par. 2, of the Bankruptcy Act, and an order allowing an appeal from the decree of the Circuit Court of Appeals. That appeal brings up the entire record for examination of such errors as are assigned by appellant, but the pratice of this court seems to confine appellee to a defense of the decree appealed from, unless cross-errors are allowed to be assigned by appellee against that part of the decree of the Circuit Court of Appeals which allowed $2500. This would seem to be the simplest way and consistent with the principles of procedure in an appeal in equity where the question before the reviewing court is whether the decree of the court below was right in justice and equity, and not merely whether error has been committed. It is because appellee finds himself in the position of being unable otherwise to argue that the Circuit Court of Appeals erred in adding $2500 to the allowance for the license fee of 1903, that this motion is made.

Appellant is attempting to obtain payment in full of the license fee for both 1902 and 1903. The referee, the District Court, and the Circuit Court of Appeals, have denied priority to the claim, and it was upon the alleged importance of the question of priority, that the appeal was allowed by the Honorable Justice who signed the certificate. If appellee should not be permitted to argue upon the hearing that $2,500 was improperly added to the claim of appellant, by the Circuit Court of Appeals, and this court held that the claim of appellant should be paid in full, it would mean that $2,500 would be taken from the bankrupt estate without an opportunity on the part of the estate to be heard on the rightfulness of the amounts allowed. Such a result plainly would be contrary to justice and equity, and would be brought about by the operation of technical rules of pratice, which ought not to be permitted to accomplish such an end.

On the other hand, all that is required to remove this hardship from appellee is an order from this court, allowing appellee to assign cross-error, or an order for a writ of *certiorari*, to which writ the record, which has already been filed and printed, can be ordered to stand as a return, thereby permitting appellee to bring before the court upon the hearing, every question which affects the justice and equity of appellant's claim. This action was taken in the case of the *United States Rubber Co.* vs. *American Oak Leather Co.* the final decision of which is reported in 181 U. S. 434.

Appellee is not litigating the matters at issue in his own right, but in his representative capacity as trustee of the bankrupt estate, and it is due to a large body of creditors of that estate that appellee be permitted to defend against the claim of appellant upon the merits, and to show that the decree of the referee, and the District Court was right and of the Circuit Court of Appeals wrong, insofar as it increased the allowance of the claim of appellant.

It is therefore submitted, that an order should be made, either allowing appellee to assign cross-error, or directing that a writ of *certiorari* issue and that the record now on file in this cause stand as a return to said writ. Such an order will meet the ends of justice and will place both parties before this court in that position of equality which equity and the law supposes them to occupy.

Respectfully submitted,

Horace Lurton Hunley

Frederick M. Miller

Counsel for Appellee.